69

No. (8)

IN THE

SUPREME COURT OF THE UNITED STATES

DERRICK KIMBROUGH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *United States v. Booker*, 543 U.S. 220 (2005), this Court held that mandatory application of the U.S. Sentencing Guidelines violates a criminal defendant's right under the Sixth Amendment to have facts that increase his or her sentence determined by a jury beyond a reasonable doubt. The Court further held that to avoid the Sixth Amendment violation, the Guidelines are to be applied as advisory only, and as one of a number of factors both that a sentencing court must consider pursuant to 18 U.S.C. § 3553(a) in exercising its discretion in selecting a sentence and that a court of appeals must consider when reviewing the sentence for reasonableness. In light of the Court's holdings, the following questions are presented.

(1) In carrying out the mandate of § 3553(a) to impose a sentence that is "sufficient but not greater than necessary" on a defendant, may a district court consider either the impact of the so-called "100:1 crack /powder ratio" implemented in the U.S. Sentencing Guidelines or the reports and recommendations of the U.S. Sentencing Commission in 1995, 1997, and 2002 regarding the ratio?

(2) In carrying out the mandate of § 3553(a) to impose a sentence that is "sufficient but not greater than necessary" upon a defendant, how is a district court to consider and balance the various factors spelled out in the statute, and in particular, subsection (a)(6), which addresses "the need to avoid unwarranted disparity among defendants with similar records who have been found guilty of similar conduct"?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

Questions Presented i

List of Parties ii

Table of Contents iii

Index to Appendix iv

Table of Authorities v

Opinions Below 1

Jurisdiction 2

Statutory Provision Involved 2

Statement of the Case 2

A. Proceedings in the District Court 2

B. Proceedings in the Court of Appeals 8

Reasons for Granting the Petition 10

A. Introduction

B. *Booker* and Its Impact on Federal Sentencing Procedure 11

C. The Court of Appeals Based Its Ruling on a Faulty Factual Premise That Contravenes Supreme Court Precedent 13

D. The Court of Appeals' Treatment of the Several Reports of the U.S. Sentencing Commission That Criticize the 100:1 Crack/Powder Ratio Conflicts With the Court of Appeals' Own Precedent and With That of at Least Three Other Circuits 15

E. The Court of Appeals' Treatment of the Factors in 18 U.S.C. § 3553(a) Conflicts With That Statute and With This Court's Decision in *Booker* 18

Conclusion 21

INDEX TO APPENDIX

United States v. Derrick Kimbrough, 4th Cir. No. 05-4554, unpublished opinion, 174 Fed. Appx. 798 (May 9, 2006). 1a

United States v. Derrick Kimbrough, 4th Cir. No. 05-4554, order denying rehearing, (June 6, 2006).. . . . . 4a

United States v. Derrick Kimbrough, E.D. Va. No. 2:04CR00185, transcript of sentencing hearing (April 11, 2005). 5a

Text, 18 U.S.C. § 3553(a). 32a

TABLE OF AUTHORITIES

Cases and Pleadings

Blakely v. Washington, 542 U.S. 296 (2004). 10

Koon v. United States, 518 U.S. 81 (1996). 14

United States v. Booker, 543 U.S. 220 (2005). . . . . i, 10, 11, 12, 13, 16, 18, 20

United States v. Bowman, 926 F.2d 380 (4th Cir. 1991). 16

United States v. Castillo, ___ F.3d ____, 2006 WL 2374281 (2d Cir. Aug. 16, 2006) 17-18

United States v. Crosby, 397 F.3d 103 (2d Cir. 2005). 12

United States v. Eura, 440 F.3d 625 (4th Cir. 2006), *petition for cert. filed* June 20, 2006 (U.S. No. 05-11659). 1, 8-9, 15, 16, 17, 18, 19, 20, 21

United States v. Falesbork, 5 F.3d 715 (4th Cir. 1993). 16

United States v. Jointer, ___ F.3d ____, 2006 WL 2266308 (7th Cir. Aug. 9, 2006) 17

United States v. Derrick Kimbrough, 4th Cir. No. 05-4554, unpublished opinion, 174 Fed. Appx. 798 (May 9, 2006). 1, 8, 9

United States v. Love, 134 F.3d 595, 607 (4th Cir.), *cert. denied*, 524 U.S. 932 (1998) 16

United States v. Miller, 450 F.3d 270 (7th Cir. 2006). 17

United States v. Pho, 433 F.3d 53 (1st Cir. 2006). 16-17, 18

United States v. Williams, 456 F.3d 1353 (11th Cir. 2006). 17, 18

Constitutional Provisions, Statutes and Legislation, and Rules

U.S. Const. amend. VI. . . . . i, 11

18 U.S.C. § 924. . . . . 2, 3, 4

18 U.S.C. § 3231. 2

18 U.S.C. § 3553. . . . . *passim*

18 U.S.C. § 3661. . . . . 6, 16

18 U.S.C. § 3742. . . . . 2, 13

21 U.S.C. § 841. . . . . 2, 3

21 U.S.C. § 846. 2

28 U.S.C. § 1254. 2

28 U.S.C. § 1291. 2

Anti-Drug Abuse Act of 1986, Pub. L. 99-570, 100 Stat. 3207 (1986). 13-14

Pub. L. No. 104-38, 109 Stat. 334 (Oct. 30, 1995). 14

S. Ct. R. 10. . . . . 11, 20

United States Sentencing Guidelines

U.S.S.G. § 2D1.1. 3

U.S.S.G. § 3C1.1. 3

U.S.S.G. § 3E1.1. 3

U.S.S.G. Ch. 5, Pt. A. 3

U.S.S.G. § 5H1.2. 6

U.S.S.G. § 5H1.5. 6

U.S.S.G. § 5H1.6. 6

U.S.S.G. § 5H1.11. 6

U.S.S.G. § 6A1.3. 16

Other Authorities

Peter H. Rossi & Richard A. Berk, *Public Opinion on Sentencing Federal Crimes* (1995, released 1997), *available at* http://www.ussc.gov/nss/jp_cxsum.htm. 10

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U.S. Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (April 1997), *available at* http://www.ussc.gov/r_congress/NEWCRACK.PDF. . . . . i, 5, 15

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below. In the alternative, he requests that the petition be held pending the Court's decision regarding certiorari in *Eura v. United States*, No. 05-11659 (petition for certiorari filed June 20, 2006).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, which is unpublished, appears at pages 1a to 3a of the appendix to the petition. *See also United States v. Kimbrough*, 174 Fed. Appx. 798 (4th Cir. May 9, 2006) (No. 05-4554). The transcript of the sentencing hearing in the district court appears at pages 5a to 31a of the appendix to the petition and is unpublished.

JURISDICTION

The district court in the Eastern District of Virginia had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction over the United States's appeal of Petitioner's sentence pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. That court issued its opinion and judgment on May 9, 2006. Petitioner sought rehearing in the court of appeals, which the court denied on June 6, 2006. A copy of the order is included at page 4a of the appendix to this petition.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The text of § 3553(a) of Title 18 of the United States Code is reproduced at pages 32a to 33a of the appendix to this petition.

STATEMENT OF THE CASE

A. Proceedings in the District Court

A grand jury sitting in the Eastern District of Virginia charged Petitioner and a co-defendant with conspiring to possess with intent to distribute crack cocaine and powder cocaine, as well as with possession with intent to distribute both crack and powder cocaine, in violation of 21 U.S.C. § 846 and § 841(a). C.A.J.A. 7-10.[1] The two men were also charged with possession of a firearm in connection with the drug offenses, in violation of 18 U.S.C. § 924(c). C.A.J.A. 11. The charges arose out of their arrests by Norfolk city police officers. *See* C.A.J.A. 83-84.

Petitioner pled to the charges as indicted, without benefit of a plea agreement, on January 11, 2005. C.A.J.A. 4-5, 82. By turning down the government's offer to dismiss the § 924(c) count,

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[1] "C.A.J.A." refers to the joint appendix filed in the court of appeals. "Pet. App." refers to the appendix attached to this petition.

C.A.J.A. 17, 39, Petitioner subjected himself to an additional mandatory minimum term of imprisonment of 60 months (five years) on the firearms charge, to run consecutively to the mandatory minimums of 120 months (ten years) on two of the three drug charges. *See* 18 U.S.C. § 924(c)(1)(A)(i), (D)(ii); 21 U.S.C. § 841(b)(1)(A)(iii). The court scheduled the sentencing hearing for April 11, 2005. C.A.J.A. 5.

In determining Petitioner's advisory guideline range, the probation officer set the base offense level pursuant to U.S.S.G. § 2D1.1 at 32, based on 92.1 grams of cocaine powder and 56 grams of crack cocaine. C.A.J.A. 84, 85. The probation officer added a two-level enhancement for obstruction of justice, U.S.S.G. § 3C1.1, and further denied Petitioner a reduction for acceptance of responsibility, U.S.S.G. § 3E1.1, to both of which Petitioner objected. C.A.J.A. 86; *see* C.A.J.A. 16-17. In regard to Petitioner's criminal history, the probation officer assessed a total of three points, which resulted in a criminal history category of II. C.A.J.A. 103-04. The offense level of 34, when combined with the criminal history category, yielded a guideline range of 168-210 months. C.A.J.A. 77; *see* U.S.S.G. Ch. 5, Pt. A.

In addition to the guideline calculation objections, counsel for Petitioner argued in his sentencing position paper that the district court should impose a sentence below the range recommended by the Sentencing Guidelines. As support for this argument, counsel cited the various factors that the court was required by 18 U.S.C. § 3553 to consider in arriving at an appropriate sentence, and urged the court to consider the disparity in sentences created by the so-called "100:1 crack/powder ratio" to ensure that the sentence would "reflect the seriousness of the offense, promote respect for the law and provide a just punishment for the offense." C.A.J.A. 18. Petitioner

went on to request a sentence consisting of the 180 months of imprisonment required by statute for the offenses of conviction. C.A.J.A. 20-21.[2]

At the sentencing hearing, the district court overruled both of Petitioner's objections to the presentence report. Pet. App. 12a-14a, 19a, C.A.J.A. 36-38, 43. Having done so, the court then proceeded to make specific findings that "the criminal history category of the defendant in this case is II and the offense level is 34," and that "the guideline range with respect to these counts indicate[s] that the guideline sentencing range is 168 to 210, plus 60 months consecutive." Pet. App. 20a, C.A.J.A. 44. Thus, the total range, reflecting the consecutive 60 months, was 228 to 270 months, or 19 to 22-1/2 years.

When asked by the court if the government had any argument in regard to the length of the sentence it should impose, the assistant U.S. Attorney asked "that the Court adopt the recommendation of the guidelines in this case" because "[t]he guidelines themselves, I mean, they take in many factors, including many of the factors in section 3553, which the Court also has to consider without question . . . ." Pet. App. 21a, C.A.J.A. 45. The assistant concluded, "I think that would be a reasonable sentence in this case so that I would ask the Court to sentence him somewhere within the guideline range, and of course, plus the 60 months for the 924(c)." *Id.* When asked by the court if the government thought that "[a]nywhere from 19 and 22 years" was "an appropriate sentence," the assistant answered, "I think it's a reasonable sentence, Your Honor." *Id.* As with its written response, the government did not address the crack/powder ratio issue.

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[2] In its written response, the government addressed only the issues regarding the enhancement for obstruction and the denial of the reduction for acceptance of responsibility. The government failed to address Petitioner's argument regarding the 100:1 crack/powder ratio. C.A.J.A. 22-27. The government had no objections of its own to the presentence report. C.A.J.A. 98.

On behalf of Petitioner, counsel again urged the court to impose a sentence no higher than the applicable mandatory minimum sentences, for a total sentence of 180 months. Pet. App. 24a, C.A.J.A. 48. Focusing on the crack/powder ratio, counsel reminded the court that Petitioner "had actually more powder cocaine than he had crack cocaine in his possession." Pet. App. 22a, C.A.J.A. 46.[3] Further, counsel reiterated the findings of the U.S. Sentencing Commission that "the current drug penalties exaggerate the relative harmfulness of crack cocaine, that they sweep too broadly and apply most often to lower-level offenders, they overstate the seriousness of most crack cocaine offenses and fail to provide adequate proportionality, and the current penalty's severity most impacts minorities . . . ."[4] *Id.* Counsel explained how the Sentencing Commission's findings went toward the various factors that the court was required by 18 U.S.C. § 3553 to consider in arriving at a sentence, and in particular the needs to avoid unwarranted disparity, to promote respect for the law, and to impose a just punishment. Pet. App. 22a-23a, C.A.J.A. 46-47. Finally, counsel also offered for the court's consideration Petitioner's relatively minor criminal history (and in particular, the fact that he had not had a felony conviction until this case), his work history, the fact that the case resulted from a state, not federal, drug interdiction, and the fact that Petitioner voluntarily submitted himself to a minimum 180-month sentence by pleading guilty as charged. Pet. App. 23a-24a,

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[3] In fact, the amount of powder cocaine was almost twice that of the amount of crack cocaine, 92.1 grams of powder as compared to 56 grams of crack. C.A.J.A. 85.

[4] *See generally* U.S. Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy* (May 2002), *available at* http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm; *see also* U.S. Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (Feb. 1995), *available at* http://www.ussc.gov/crack/exec.htm; U.S. Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (April 1997), *available at* http://www.ussc.gov/r_congress/NEWCRACK.PDF.

C.A.J.A. 47-48. The government did not respond to any of defense counsel's points. *See* Pet. App. 24a, C.A.J.A. 48.

Before imposing sentence upon Petitioner, the district court explained how it arrived at its decision. First, the court reviewed the considerations that it was required to take into account in determining the sentence:

> The Court is required to impose a sentence in this case to do several things: To reflect the seriousness of the offense, to afford adequate deterrence to Mr. Kimbrough's criminal conduct, to protect the public from further crimes committed by the defendant, to provide the defendant with needed educational or vocational training, medical care or other correctional treatment in the most effective way.

Pet. App. 24a-25a, C.A.J.A. 48-49. The court also recognized that it was "required to consider factors other than what the sentencing guidelines recommend because the sentencing guidelines constitute only one factor. The sentencing guidelines as calculated exclude[] consideration of a number of factors that [§] 3553(a) tells the Court that the Court should consider" – things such as the history and characteristics of the defendant, his educational and vocational skills, his family ties and background, and his military record[5] – "[y]et the sentencing factors other than the guidelines say[] the Court should consider those."[6] Pet. App. 26a, C.A.J.A. 50.

The court also stated the ultimate legal standard that it was required to apply in determining a sentence, that "[o]ne thing the statute tells the Court to do [is that] in fashioning a sentence, the Court is not to impose a sentence that is greater than necessary to accomplish the factors I have just

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[5] *See* U.S.S.G. §§ 5H1.2, 5H1.5, 5H1.6, 5H1.11.

[6] *See* 18 U.S.C. § 3553(a)(1) (a sentencing court "shall consider . . . the history and characteristics of the defendant"); *see also* 18 U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.").

outlined." Pet. App. 25a, C.A.J.A. 49. The court then expressed its view "that to impose a sentence of 19 to 22 years in this case is ridiculous" because "[i]t imposes more punishment, given the record here, than is necessary to accomplish what needs to be done." *Id.* The court went on to explain why this was so.

First, the court recognized that while Petitioner and his co-defendant were caught with both powder cocaine and crack cocaine (the nature and circumstances of the offense), it was the latter that was "driving the offense level to a point higher than is necessary to do justice in this case." Pet. App. 25a, C.A.J.A. 49. The court specifically relied upon the fact that "the Sentencing Commission [has] recognize[d] that crack cocaine has not caused the damage that the Justice Department alleges it has . . . ." *Id.* The court also considered Petitioner's history and background, such as the fact that while Petitioner had a criminal record, "it's a record involving misdemeanors, and as counsel points out, until this case, he has not had a felony conviction." Pet. App. 25a-26a, C.A.J.A. 49-50. Further, the court considered "that this defendant at one time served in combat in Desert Storm and honored his country and received an honorable discharge, and that for [the] most part since he was honorably discharged, the defendant has been a construction worker and has found meaningful employment someplace." Pet. App. 27a, C.A.J.A. 51.

Finally, returning to the fact that the offense involved both crack and powder cocaine, the court noted "that the crack cocaine involved in this case does in fact exaggerate the advisory guideline" and that "should [the Court] follow the advisory guidelines, the penalty imposed would be clearly inappropriate and greater than necessary to accomplish what the statute says you should in fact accomplish in this case." *Id.* Accordingly, "[g]iven all of those factors and the Court's need to avoid imposing an unwarranted disproportionate sentence," the Court sentenced Petitioner to 120 months on each of the drug convictions and 60 months on the firearms conviction, for a total of 180

months, "which is clearly long enough under the circumstances." Pet. App. 27a-28a, C.A.J.A. 51-52.[7]

B. Proceedings in the Court of Appeals

The United States appealed the sentence imposed by the district court. Following the completion of briefing, the court of appeals scheduled the case for oral argument on December 2, 2005, the same day as argument in *United States v. Eura*, 4th Cir. No. 05-4533. Two and a half weeks before argument, however, the court removed Petitioner's case from the argument calender. *See United States v. Kimbrough*, 4th Cir. No. 05-4554, docket entries for Oct. 5 and Nov. 14, 2005; *see also United States v. Eura*, 4th Cir. No. 05-4533, docket entries for Oct. 5 and Dec. 2, 2005.

On February 24, 2006, the court of appeals issued its decision in the *Eura* case. *See United States v. Eura*, 440 F.3d 625 (4th Cir. 2006), *petition for cert. filed* June 20, 2006 (U.S. No. 05-11659). In that decision, the court held that a district court cannot vary from the advisory sentencing range on the basis of the disparity created by the 100:1 crack/powder ratio or the U.S. Sentencing Commission's recommendations in regard to the ratio, and that a sentence based on that information would be deemed unreasonable. *See id.* at 632-34. Without any reference to the prefatory language of 18 U.S.C. § 3553(a), that a district court "shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of sentencing spelled out in the remainder of the sentencing statute, the court of appeals stated that, "in arriving at a reasonable sentencing, the [district] court simply must not rely on a fact that would result in sentencing disparity that totally is at odds with the will of Congress." 440 F.3d at 634. The appellate court further held

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[7] While the court indicated that it thought that the 180-month sentence was too long, the court also recognized that it was, of course, bound by the mandatory minimum sentences directed by Congress on three of the four counts. Pet. App. 28a, C.A.J.A. 52.

that "[t]he Sentencing Commission's recommendations to narrow the 100:1 ratio are such impermissible factors and, thus, cannot be used as a basis to vary from the advisory sentencing range." *Id.* Because the court of appeals was "of the opinion that the district court did not adequately and properly consider 18 U.S.C. § 3553(a)(6) in sentencing Eura," the court vacated the below-guidelines sentence. *Id.* at 632, 634. Judge Michael, while concurring in the judgment, effectively dissented as to the latter part of the majority's holding. In his view, the Sentencing Commission "reports can be used to support a below-guidelines sentence that takes into account the several case-specific factors in § 3553(a) and at the same time respect[] the single factor in § 3553(a)(6). *Id.* at 635.

The court of appeals issued its opinion in Petitioner's case on May 9, 2006. Pet. App. 1a; *United States v. Kimbrough*, 174 Fed. Appx. 798 (4th Cir. May 9, 2006) (No. 05-4554). In a brief unpublished per curiam ruling, the court stated, "According to our recen: decision in *United States v. Eura*, 440 F.3d 625 (4th Cir. 2006), a sentence that is outside the guideline range is per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses." Pet. App. 2a. The court accordingly determined that "[b]ecause the district court concluded that the crack to powder disparity warranted a sentence below the applicable guideline range, we are constrained to vacate Kimbrough's sentence and to remand the case for resentencing." Pet. App. 3a.

REASONS FOR GRANTING THE PETITION

A. Introduction

In the last five years alone, over 25,000 defendants, representing 20% of those defendants sentenced federally for controlled substance offenses, have been sentenced for crack cocaine offenses.[8] The vast majority of those defendants, like Petitioner, are black men.[9] Sentences for crack cocaine offenses run, on average, 40 months longer than sentences for powder cocaine offenses. Viewed another way, crack cocaine sentence are more than 50% longer than powder cocaine sentences,[10] notwithstanding the general public's disagreement with the harshness of crack cocaine sentences.[11] The 100:1 crack/powder ratio results in the expenditure of millions of dollars every year

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[8] *See* U.S. Sentencing Commission, *2001 Sourcebook of Federal Sentencing Statistics* 68 (Table 33), *available at* http://www.ussc.gov/ANNRPT/2001/SBTOC01.htm; U.S. Sentencing Commission, *2002 Sourcebook of Federal Sentencing Statistics* 68 (Table 33), *available at* http://www.ussc.gov/ANNRPT/2002/SBTOC02.htm; U.S. Sentencing Commission, *2003 Sourcebook of Federal Sentencing Statistics* 78 (Table 33), *available at* http://www.ussc.gov/ANNRPT/2003/SBTOC03.htm; U.S. Sentencing Commission, *2004 Sourcebook of Federal Sentencing Statistics* 94, 300 (Table 33 before and after *Blakely v. Washington*, 542 U.S. 296 (2004)), *available at* http://www.ussc.gov/ANNRPT/2004/SBTOC04.htm; U.S. Sentencing Commission, *2005 Sourcebook of Federal Sentencing Statistics* 96, 314 (Table 33 before and after *United States v. Booker*, 543 U.S. 220 (2005)), *available at* http://www.ussc.gov/ANNRPT/2005/SBTOC05.htm.

[9] *2001 Sourcebook* at 69, 70 (Tables 34, 35); *2002 Sourcebook* at 69, 70 (Tables 34, 35); *2003 Sourcebook* at 79, 80 (Tables 34, 35); *2004 Sourcebook* at 95, 96, 301, 302 (Tables 34, 35 before and after *Blakely*); *2005 Sourcebook* at 97, 98, 315, 316 (Tables 34, 35 before and after *Booker*).

[10] *2001 Sourcebook* at 81 (Figure J); *2002 Sourcebook* at 81 (Figure J); *2003 Sourcebook* at 91 (Figure J); *2004 Sourcebook* at 107, 313 (Figure J before and after *Blakely*); *2005 Sourcebook* at 109, 328 (Figure J before and after *Booker*).

[11] *See* Peter H. Rossi & Richard A. Berk, *Public Opinion on Sentencing Federal Crimes* 66-67 & Table 4.7 (in Chapter 4) (1995, released 1997), *available at* http://www.ussc.gov/nss/jp_exsum.htm. The survey found that while the Guideline mean sentence for trafficking in crack cocaine was nearly 22 years, respondents would give a mean sentence of only 14.2 years, the same that they would give for trafficking in powder cocaine. Similarly, while the Guideline median sentence for crack cocaine offenses was also 22 years, the median sentence imposed by the

(continued...)

in increased incarceration costs for the Federal Bureau of Prisons. More importantly, it results in thousands of additional years of lives spent in prison, and in incalculable, unquantifiable losses to the affected defendants and their families.

The sheer number of cases affected by the 100:1 crack/powder ratio alone warrants this Court's review of the questions presented as important matters that also involve important federal questions. *See* S. Ct. R. 10(a), (c). However, the Court should also grant certiorari for three additional reasons. First, the ruling of the court of appeals that lower courts cannot consider the impact of the 100:1 crack/powder ratio through the several reports of the U.S. Sentencing Commission contravenes Supreme Court precedent. *See* S. Ct. R. 10(c). Second, the court of appeals' treatment of those reports conflicts with the court of appeals' own precedent and with that of at least three other circuits. *See* S. Ct. R. 10(a). And third, the court of appeals' treatment of the factors in 18 U.S.C. § 3553(a) conflicts with that statute and with this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). S. Ct. R. 10(c). Further, how the district courts (and, consequently, the appellate courts) should treat the § 3553(a) factors is an important question of federal law because it affects upwards of 70,000 cases each year.

B. *Booker* and Its Impact on Federal Sentencing Procedure

In *United States v. Booker*, 543 U.S. 220 (2005), this Court held that a federal criminal defendant's Sixth Amendment rights are violated when his or her sentence is increased under the United States Sentencing Guidelines based on the district judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant. *Id.* at 243-44. As a remedy for the constitutional infirmity presented when the Guidelines mandate a sentence increase

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[11] (...continued)
respondents was only 10 years, again the same as for powder cocaine offenses. *Id.*

based on judge-found facts, the Court severed 18 U.S.C. § 3553(b)(1) from the Sentencing Reform Act of 1984, thereby rendering the Guidelines "effectively advisory." *Id.* at 245.

Under *Booker*, a sentencing court must still "consider Guidelines ranges," but is now permitted "to tailor the sentence in light of other statutory concerns as well" under § 3553(a). *Id.* at 245-46; *see* 18 U.S.C. § 3553(a). In other words, the Sentencing Reform Act now requires district judges "to take account of the Guidelines together with other sentencing goals" set forth in § 3553(a). 543 U.S. at 245. Section 3553(a) in turn mandates that a district court "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) . . . ." Section 3553(a)(2) describes those purposes as the needs of the sentence imposed

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendants; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

Moreover, courts are to consider (1) the nature and circumstances of the offense and the history and characteristics of the defendant, *see* § 3553(a)(1); (2) the kinds of sentences available, *see* § 3553(a)(3); (3) the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct, *see* § 3553(a)(6); and (4) the need to provide restitution to victims, *see* § 3553(a)(7). "[W]ith the mandatory duty to apply the Guidelines excised, the duty imposed by section 3553(a) to 'consider' numerous factors acquires renewed significance." *United States v. Crosby*, 397 F.3d 103, 111 (2d Cir. 2005).

In addition to excising § 3553(b)(1), the Court determined that it was also necessary to excise 18 U.S.C. § 3742(e), which had provided the standards of review for the federal courts of appeals to apply in considering sentencing appeals. The Court excised the latter provision because "it depend[ed] on the Guidelines' mandatory nature." *Booker*, 543 U.S. at 245.

Appellate courts thus continue to review sentencing determinations under *Booker* and § 3553(a), but apply a different standard than before. The federal courts of appeals now review sentencing decisions only for unreasonableness. More specifically, "appellate courts [are] to determine whether the sentence 'is unreasonable' with regard to § 3553(a). Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable." *Booker*, 543 U.S. at 261.

In short, in directing the lower courts in how to proceed under a sentencing scheme in which the Sentencing Guidelines are advisory, not mandatory, the Court made quite clear that the Guidelines are one of many factors to be considered. 543 U.S. at 261; *see id.* at 245-46. Moreover, the Court placed no limits on the kinds of information that a district court may consider in determining what sentence to impose.

C. The Court of Appeals Based Its Ruling on a Faulty Factual Premise That Contravenes Supreme Court Precedent

The first reason why the Court should grant certiorari is that the court of appeals relied upon an erroneous factual assumption that in turn contravenes Supreme Court precedent. Specifically, the court assumed that the 100:1 ratio as implemented in the Sentencing Guidelines was required by Congress. That is incorrect. All that Congress has specified is that sentences imposed pursuant to mandatory minimum *statutory* provisions utilize the 100:1 ratio. *See* Anti-Drug Abuse Act of 1986,

Pub. L. 99-570, 100 Stat. 3207 (1986). Congress simply has never affirmatively directed the Sentencing Commission to incorporate that ratio into the Sentencing Guidelines. Moreover, even in rejecting the Commission's attempt to change the ratio in 1995, Congress still did not direct the Commission that it must retain the ratio. Quite to the contrary, Congress told the Commission to study the matter further and try again. *See* Pub. L. No. 104-38, 109 Stat. 334 (Oct. 30, 1995).

Thus, now that the Sentencing Guidelines are advisory, once a district court has correctly calculated the advisory guideline range (using the 100:1 ratio as incorporated in the Guidelines in the first instance) and taken that range into consideration, the only 100:1 ratio that the court must abide in the end by is the one embodied in the mandatory minimum statutes – which the district court in Petitioner's case in fact observed. Accordingly, because the position of the court of appeals rested upon a crucial but faulty factual assumption, a grant of certiorari is warranted.

A grant of certiorari by this Court is further warranted because the erroneous factual assumption by the court of appeals further led it to contravene the Supreme Court's opinion in *Koon v. United States*, 518 U.S. 81 (1996), by limiting the district court's discretion. In *Koon*, the Ninth Circuit had held as a matter of law that the district court could not consider certain bases for a downward departure. In rejecting the government's arguments in defense of the appellate court's ruling, the Supreme Court stated, "Those arguments, however persuasive as a matter of sentencing policy, should be directed to the [Sentencing] Commission. *Congress did not grant federal courts authority to decide what sorts of sentencing considerations are inappropriate in every circumstance.*" *Id.* at 106 (emphasis added).

As explained above, however, Congress has mandated the use of the 100:1 ratio *only* for statutory mandatory minimum sentences; it has not mandated the ratio for the Guidelines. Moreover, the Sentencing Commission has, on multiple occasions, determined that the 100:1 ratio does not

comport with the requirements of 18 U.S.C. § 3553(a). Yet by ruling that a district court can *never* consider the propriety of the 100:1 ratio in determining what sentence to impose in a particular case, the court of appeals has exercised exactly the authority that the Supreme Court struck down in *Koon*. Accordingly, because the position of the lower court conflicts with Supreme Court precedent, this Court should grant certiorari.

D. The Court of Appeals' Treatment of the Several Reports of the U.S. Sentencing Commission That Criticize the 100:1 Crack/Powder Ratio Conflicts With the Court of Appeals' Own Precedent and With That of at Least Three Other Circuits

Similarly, this Court should grant certiorari to consider whether and in what manner a sentencing court may consider the 1995, 1997, and 2002 reports of the United States Sentencing Commission that study the validity and impact of the 100:1 crack/powder ratio and the recommendations made in the reports. The majority of the *Eura* court took the position that the reports can never be considered. *United States v. Eura*, 440 F.3d at 625, 634 (4th Cir. 2006) (stating that "[t]he Sentencing Commission's recommendations to narrow the 100:1 ratio are such impermissible factors [as they "would result in a sentencing disparity that is totally at odds with the will of Congress"], and, thus, cannot be used as a basis to vary from the advisory sentencing range"), *petition for cert. filed* June 20, 2006 (U.S. No. 05-11659). Judge Michael in his concurring opinion, however, noted that the Commission exhaustively researched the reports and based them upon substantial evidence and public comment. *Id.* at 635-36. Judge Michael took the position that the sentencing courts should be allowed to consider the Commission reports within the context of the specific facts of a particular defendant's case. *Id.* at 637.

The majority's absolute position conflicts with circuit precedent. Prior Fourth Circuit cases have always erred on the side of allowing sentencing judges to consider a wide array of information

in formulating a sentence. For example, in *United States v. Falesbork*, 5 F.3d 715, 722 (4th Cir. 1993), the court of appeals noted "the broad scope of information that 18 U.S.C. § 3661 permits a sentencing judge to consider."[12] Hearsay evidence is routinely and liberally allowed into evidence at sentencing hearings. *United States v. Love*, 134 F.3d 595, 607 (4th Cir.), *cert. denied*, 524 U.S. 932 (1998); *accord United States v. Bowman*, 926 F.2d 380, 381 (4th Cir. 1991); *see* U.S.S.G. § 6A1.3, comment (stating that any information may be considered, so long as it has "sufficient indicia of reliability to support its probable accuracy"). The entire "relevant conduct" foundation on which the Sentencing Guidelines are predicated follows the principle that judges should be given the maximum amount of information possible.

In the *Eura* decision, however, the majority opinion took the unusual step of limiting the information a district court can consider when sentencing a defendant. Further, it removed from consideration not just any information, but the thoroughly-researched and thoughtfully-considered reports of the Sentencing Commission.

In contrast, Judge Michael's more nuanced approach of allowing consideration of the reports in the context of a particular case upholds the prior practice of empowering sentencing judges with the maximum amount of knowledge and information possible. This approach is also consistent with the First Circuit's decision in *United States v. Pho*, 433 F.3d 53 (1st Cir. 2006), in which that court stated that by its decision, it did "not intend to diminish the discretion that, after *Booker*, district court courts enjoy in sentencing matters *or to suggest that, in a drug-trafficking case, the nature of*

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[12] Section 3661 provides that "[n]o limitation shall be placed on the information concerning the background, character and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

the contraband and/or the severity of a projected guideline sentence may not be taken into account on a case-by-case basis." *Id.* at 65 (emphasis added).

The *Eura* majority's position is also inconsistent – and Judge Michael's position consistent – with that of the Seventh Circuit in *United States v. Jointer*, ___ F.3d ___, 2006 WL 2266308 (7th Cir. Aug. 9, 2006), and with that of the Eleventh Circuit in *United States v. Williams*, 456 F.3d 1353 (11th Cir. 2006). In *Jointer*, the Seventh Circuit reiterated its earlier decision in *United States v. Miller*, 450 F.3d 270, 275 (7th Cir. 2006), that district courts are required to implement the 100:1 ratio in calculating the correct sentencing guideline range. 2006 WL 2266308, at *3. However, "[t]o ensure that our holding is received in the proper context," the court "emphasize[d] that, once a correct guideline sentence has been calculated, the district court must fashion an individual sentence for the defendant before it by evaluating all the facts and circumstances of the case" in light of the § 3553(a) factors. *Id.* at *4. Importantly, the Seventh Circuit explicitly stated that "[a]t this later stage of the sentencing proceedings, the Sentencing Commission's detailed reports on crack and cocaine sentencing may have 'practical utility' to a district court's evaluation of the facts and circumstances" of the case before it. *Id.* (citing *Eura*, 440 F.3d at 634 (Michael, J., concurring)). Similarly, in *Williams*, the Eleventh Circuit specifically acknowledged that "[i]t may be that for some of the reasons stated in the Sentencing Commission's reports, the Guidelines range in a given crack case overstates the seriousness of the particular defendant's offense . . . ." 456 F.3d at 1369 (citing *Eura*, 440 F.3d at 637 (Michael, J., concurring)).

Finally, although it did not specifically address the use of the Sentencing Commission reports in its recent decision in *United States v. Castillo*, ___ F.3d ____, 2006 WL 2374281 (2d Cir. Aug. 16, 2006), the Second Circuit has also intimated that they could be used. At the conclusion of the opinion, the court acknowledged that although it could not allow lower courts to use a ratio other

than 100:1 in calculating the guideline range in a crack cocaine case, "we would be blind to the thoughtful policy discussions of the last dozen years if we did not acknowledge what our survey of Sentencing Commission reports and recommendations . . . reveals." 2006 WL 2374281, at *21. However, after again emphasizing the need to apply the 100:1 ratio in setting the guideline range, the court stated that "[t]hat is not to say that district courts must always sentence within the ratio provided by the Guidelines; that would indeed be error under *Booker*." *Id.* These statements, when taken together and further combined with the court's citation to the First Circuit's *Pho* decision and the Eleventh Circuit's *Williams* decision, suggest that a district court within the Second Circuit – unlike those in the Fourth Circuit – could look for support from the Commission reports to use with case-specific facts in justifying a sentence below the advisory guideline range determined by reference in the first instance to the 100:1 crack/powder ratio.

In short, because the majority's approach is inconsistent with the usual practice of giving judges broad latitude in the information that they may consider at sentencing, and because the majority's approach also conflicts with that of several other circuits, this Court should grant certiorari to consider in what manner a sentencing court can consider the Sentencing Commission's reports and recommendations regarding the 100:1 crack/powder ratio.

E. The Court of Appeals' Treatment of the Factors in 18 U.S.C. § 3553(a) Conflicts With That Statute and With This Court's Decision in *Booker*

The court of appeals' opinion in *Eura* stated that after *Booker*, sentencing requires two steps. First, the district court must consult the Sentencing Guidelines and correctly calculate the range provided by the Guidelines. Second, the court must consider this sentencing range along with the other factors described in 18 U.S.C. § 3553(a) and then impose a sentence. *See* 440 F.3d at 632.

Conspicuously absent from this summary of sentencing procedure is any mention of the prefatory language found in § 3553(a), which commands that the district court "shall impose a sentence sufficient but not greater than necessary to comply with the purposes" of sentencing set forth in § 3553(a)(2). This language sets the framework for the consideration of all of the factors listed in § 3553(a), and its omission from the *Eura* opinion raises the question of whether the court of appeals ever considered it in either that case or in Petitioner's case.

Moreover, the *Eura* decision ruled that the district court did not "adequately and properly" consider § 3553(a)(6) when it sentenced the defendant. 440 F.3d at 632. Section 3553(a) lists seven factors (with sub-parts) that the court must consider. Subsection (a)(6) speaks to the need to avoid "unwarranted sentencing disparities." In concluding that the district courts erred in both *Eura* and in Petitioner's case, the court of appeals placed too much emphasis on that one factor, to the exclusion of the other six factors. But there is nothing in the plain language of § 3553(a) that indicates that any one of these factors in general, or (a)(6) in particular, should be given any more weight than any other factor.

To the contrary, Congress, in promulgating § 3553(a), did not elevate the disparity factor above the others, instead leaving the weighting of the listed factors to the judge determining an individualized sentence. Given that Congress did not choose to rank-order the importance of the various factors in § 3553(a), the court of appeals should not do so either. (And even if § 3553(a) could be construed as requiring weighting of the enumerated factors, it bears noting that the disparity factor ranks sixth out of seventh on the list, thus suggesting that it is not as important as, for example, the need for the sentence imposed "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." *See* 18 U.S.C. § 3553(a)(2).)

Further, this Court predicted just such a debate in *Booker*, and moved preemptively to refute the idea that concern for disparity should skew post-*Booker* sentencing. Contrary to what appears to be the court of appeals' view in *Eura* that concern for disparity trumps all other § 3553(a) considerations, this Court recognized and accepted the fact that abandoning mandatory guidelines for advisory guideline and a new standard of appellate review would in some instances undercut the pursuit of uniformity. As the Court explained, it did not share the "belief that use of a reasonableness standard 'will produce a discordant symphony' leading to 'excessive sentencing disparities,' and 'wreak havoc' on the judicial system." 543 U.S. at 263 (quoting Justice Scalia's dissent, 543 U.S. at 312, 313). This is because "[t]he Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices. It will thereby promote uniformity in the sentencing process." *Id.* However, the Court acknowledged, "[w]e cannot and do not claim that use of a 'reasonableness' standard will provide the uniformity that Congress originally sought to secure." *Id.*

In short, this Court should grant certiorari on Question 2 because the court of appeals elevated the need for uniformity above all other § 3553(c) considerations in a manner that conflicts with both § 3553(a) itself and with *Booker*. Question 2 thus presents an important question of federal law, S. Ct. R. 10(c), as the answer to it affects approximately 70,000 or more defendants sentenced under the Guidelines each year.[13] The Court's consideration of the question is needed to provide guidance to the district courts in the first instance, and to the courts of appeals in reviewing sentences.

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[13] *2003 Sourcebook* at 14 (Table 3); *2004 Sourcebook* at 14 (Table 3); *2005 Sourcebook* at 14 (Table 3).

CONCLUSION

For the reasons given above, Petitioner requests that this Court grant this petition for certiorari, or in the alternative, hold the petition pending the Court's determination as to whether to grant certiorari in *Eura v. United States*, No. 05-11659 (petition for certiorari filed June 20, 2006).

Respectfully submitted,

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